

United States Postal Service and Barbara Y. Frost.
Case 5-CA-11972(P)

February 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On July 22, 1981, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a cross-exception and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United States Postal Service, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

MEMBER JENKINS, dissenting in part:

I join the majority in finding that Respondent violated Section 8(a)(1) of the Act by requiring Barbara Frost to participate in an investigatory interview that she reasonably believed might result in disciplinary action and by failing to honor her request to have a union representative present. However, for the reasons stated in my dissent in *Kraft Foods, Inc.*, 251 NLRB 598, 599 (1980), I would grant her a full make-whole remedy since an unlawful interview has occurred and she has been disciplined for conduct which was the subject of the unlawful interview.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT require any employee to take part in an investigatory interview where the employee has reasonable grounds to believe that the matter to be discussed may result in disciplinary action and where we have ignored, denied, or refused any request by the employee to have union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

UNITED STATES POSTAL SERVICE

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard in Washington, D.C., on September 15, 1980, based on a charge filed February 26, 1980, and a complaint issued on April 10, 1980, and amended June 2, 1980. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by failing to permit the Charging Party, Barbara Y. Frost, to have a union representative present during an interview where she could reasonably believe that disciplinary action would be involved and by suspending the Charging Party as a result of the interview.

Upon the entire record in the case, including my observation of the witnesses and my consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

The Respondent, United States Postal Service, is an independent establishment of the Government of the United States, which provides postal service throughout the United States. The Board derives its jurisdiction over Respondent in this matter from section 1209 of the Postal Reorganization Act. I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent admits, and I find, that the American Postal Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Contentions*

The complaint alleges that Respondent refused employee Barbara Frost's request to have a union shop steward present at an interview that she reasonably believed would lead to discipline, thereafter suspended Frost for 7 days, and thereby violated Section 8(a)(1) of the Act. Respondent claims that Frost waived her right to a shop steward's presence, that, in any event, the "interview" was in fact an extension of a discussion on the work floor, and was not one likely to lead to disciplinary action. Respondent also contends that the Board should stay its hand because Frost had filed a grievance which had already been processed through the third step of Respondent's grievance procedure, citing the Board's *Dubo Manufacturing Corporation* case, 142 NLRB 431 (1963). Finally, Respondent contends that in the circumstances of this case, even if it should be found that Frost's rights were violated, Respondent should not be ordered to pay any backpay to Frost.

B. *The Facts*

With one critical exception, the underlying facts are not in serious dispute. On February 4, 1980, Frost was assigned to work on a particular machine (a letter sorter) at the postal facility. She came to the machine carrying a large container of water. Foreman Patrick McCoy told her she could not place the container on the machine. Frost replied that she needed to drink seven or eight glasses of water a day for medical reasons. Acting General Foreman Robert Scott then joined the discussion, apparently at McCoy's behest, with Foreman Robinson appearing during its course. Scott affirmed that Frost could not have the water on the machine. Scott then said he was going to get the tour director. Frost said, "If you are going to get all these people, then I'll need a shop steward." Scott, according to Frost, did not reply. He then left and returned with Mail Processing Director Arthur Butler and another supervisor named Kirkman. The group proceeded toward the tour superintendent's office. On the way there, Frost said to Butler, "If I'm going to the Tour Director's office, you know, I need a shop steward." He replied, according to Frost, that he "didn't know anything."

Butler, who on that day was the highest ranking official on the scene, testified that he was walking past the LSM operation and noticed Frost and Scott in conversation. After ascertaining from Scott the nature of the problem, and that Scott had told Frost to go to the tour superintendent's office, Frost said that she wanted a shop steward—that she was not going to the tour superintendent's office without a shop steward. Butler "then instructed Mr. Scott to get her a shop steward, and advised Ms. Frost at the same time that bringing food or beverages or any extraneous matter on the workroom floor was a violation of Postal Rules of Conduct." Butler then left the scene, and was not a witness to any of the other events of that day.

Donald Sink, the "Tour Superintendent" that day, met with Scott and Frost at the tour director's office. Frost

again asked for a shop steward but Sink said she did not need a shop steward, after Scott asked whether he should get one. Sink asked Frost what the problem was. She said she had no problem, just a "misunderstanding," and explained the situation as she had earlier on the floor. After some further discussion between Frost and Sink, he asked her if she were going back to work. She replied no, that she was going home. He said he could not approve any leave. Frost left, signing out on emergency annual leave. On her way out, Frost spoke to a Ms. Dawkins, telling her what had occurred. Dawkins then contacted Roosevelt Odom, executive vice president of the Union. Odom then spoke with Sink and Scott, with nothing said of any significance or materiality here.

Subsequently, on March 21, 1980, Frost received a 7-day suspension for "failure to follow instructions." Prior to the suspension, reports had been written by both Scott and McCoy concerning the February 21 incident. With the ultimate concurrence of both Sink and McCoy, the suspension took place as noted.

On March 31, 1980, the Union filed a grievance on Frost's behalf. It was denied on September 8, 1980, at the third step. There is a sharp conflict between Frost's and Sink's versions of what occurred on February 21 when Frost and Scott came to the tour superintendent's office. Sink testified that when Frost entered the office "she was murmuring something. I don't know exactly what she was saying." When he "started to instruct—inform Ms. Frost, I should say, that Mr. Scott had advised me of the situation on the floor, and I really couldn't get even complete sentences out before she would break in. In one instance she broke in and said, I want a shop steward." Sink replied, "That's fine. You sit down. We will get a shop steward." Frost then said, according to Sink, that she was not waiting for anybody. Sink's testimony continues by describing his further conversation with Frost, including asking her a number of questions concerning the incident.

Scott, the only other person present at the office with Frost and Sink, testified that Frost first "said something about getting a shop steward" as they were walking down the aisle going toward the tour superintendent's office, and that he told her he would get her a steward later. Scott added that when Butler and Kirkman walked by, Frost "blurted out something to Mr. Butler about a shop steward. He asked me—I think he asked me if I was going to get her a shop steward, and I said I would get her a shop steward later." Scott also testified that Frost "might have said something about a shop steward. I can't remember exactly," in the course of the meeting with him and Sink. Although specifically asked, Scott did not recall Sink saying anything about a shop steward, nor did he recall if Sink said she did not need a shop steward.

Discussion

Despite the differing version of exactly what took place on February 21, two facts are abundantly clear. Frost did ask for a shop steward at each step along the path from her work station to the tour superintendent's

office, and of each management official involved. Second, she never did get a shop steward. Without regard then, to the difference between Frost's and Sink's testimony set forth above, and considering the length of time between her initial request for a shop steward and her ultimate leaving the tour superintendent's office, her right to a steward had already fully "matured." Compare *Roadway Express, Inc.*, 246 NLRB 1127 (1979). Butler had told Scott to get a shop steward, and no reason appears why at least, at that point, Frost's request could not have been honored. Butler, having instructed Scott to get Frost a shop steward, emphasizes the failure to provide one, rather than a failure on Frost's part to wait for one, and that, at least in Butler's view, the situation called for a shop steward's presence when so requested by Frost.¹

Indeed, the failure of Scott to corroborate Sink's testimony suggests that Frost's version of what occurred is the more credible one. It seems unlikely that Frost, after insisting upon and requesting a union steward time and again, would suddenly decide she no longer wanted one. Even if she had, perhaps, lost patience, and decided to leave, she had already, as shown above, been denied her right to have the steward present, as a factual matter.

That the right existed as a legal matter is also apparent on the facts of this case. Respondent, as noted earlier, claims that management was merely moving "shop talk" from the working floor to the office, and was therefore "clearly within its rights in ordering her to report to the Tour Superintendent's office." I agree that Respondent, in all the circumstances, clearly had a right to direct Frost to the office. This is not to say, however, that the employee's right to have a union representative disappears. *Roadway Express, Inc.*, *supra*, and compare *Chrysler Corporation*, 241 NLRB 1050 (1979).

Scott testified that he asked Frost to report to the tour superintendent's office so that "maybe he could reason with her; or, if not, take whatever action he felt necessary." Frost had received a 30-day suspension in 1978 and, most significantly, none of the management personnel involved ever informed her that the meeting would have an adverse effect upon her, that it was not for disciplinary purposes. Although I conclude below that the suspension received by Frost was not a *result* of the interview, this does not mean that she did not or could not reasonably have feared that discipline might result.

Respondent's contention that this case should be deferred under *Dubo, supra*, is without merit. As stated by the Board in *Youngstown Sheet and Tube Company*, 235 NLRB 572, 575 (1978), "[T]he matter has not been submitted to arbitration and there is no particular reason to think that it would be." Here, as in *Youngstown*, the Charging Party's decision to file charges with the Board indicates a choice of ". . . this forum, rather than the arbitral process, for ultimate resolution of [the] dispute." The present charge was, indeed, filed more than a month before the grievance was filed. I conclude, therefore,

that deferral to the arbitral process is neither necessary nor warranted here.

I find, however, that Respondent has met the burden of showing that the decision to discipline Frost was not based on any information obtained at the interview. *Kraft Foods, Inc.*, 251 NLRB 598 (1980). Even though the suspension did not occur until after the interview, no new facts were elicited or developed therein. The General Counsel asserts in his brief that Sink testified that he relied on the interview in approving the recommendation for discipline made by Scott and McCoy. Sink testified that he made his recommendation "on a review of the statements from Mr. McCoy and Mr. Scott." The following colloquy then took place between counsel for the General Counsel and Sink:

Q. . . . I wonder if you could explain in some detail what your recommendation was based on.

A. On a review of the statements from Mr. McCoy and Mr. Scott.

Q. You attached no weight to the interview that was held in your office with Ms. Frost?

A. Not other than she was uncooperative, and there was no statement in there—there would normally be a statement from the employee as to why—no.

Q. At least to the extent she was uncooperative, you did take that into account. Isn't that correct?

A. I am going to have to think about it. (Witness pauses.) No, I don't believe so.

Q. You don't believe you took it into account at all?

A. No.

Q. So you reached your decision entirely on the basis of the written reports that were written by Mr. McCoy and Mr. Scott?

A. Yes, I did.

I am satisfied that Sink was honestly attempting to give his motivation for accepting the recommendation. In his remark "not other than she was uncooperative," I believe he was referring to the fact that she advanced no reason beyond what was already quite evident from the previous floor discussions. But the fact that her failure to exculpate herself with some acceptable reason occurred at the interview does not mean that the discipline in any way resulted therefrom. Accordingly, I shall not recommend any make-whole remedy herein.

CONCLUSION OF LAW

Respondent, by requiring an employee to take part in an investigatory interview where the employee had reasonable grounds to believe that the matter to be discussed might result in her being the subject of disciplinary action and by failing to honor her request to have a union representative present, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

¹ Butler's testimony that if Frost "wanted to have a steward present at the meeting between she and management it was quite all right with me and they should get it," in no way militates against the foregoing conclusion.

THE REMEDY

I shall recommend that Respondent cease and desist from its unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²

The Respondent, United States Postal Service, Washington, D.C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requiring employees to take part in an investigatory interview where the employee has reasonable grounds to believe that the matter to be discussed may result in disciplinary action and where Respondent has ignored, denied, or refused the employee's request to have union representation.

² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at Respondent's postal facility in Washington, D.C., copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."